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IN THE

# Supreme Court of the United States of America

October Term, 1949.

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Case No.....

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AUBREY B. BURTON, doing business as
A. B. BURTON COMPANY,
APPELLANT-PLAINTIFF,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
APPELLEES-DEFENDANTS.

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REPLY BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM, FILED BY APPELLEES.

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## STATEMENT.

This is a suit to have set aside and annulled certain orders entered by the Interstate Commerce Commission in Docket No. 29072, and Service Order No. 68 of January 30, 1942, and the enforcement, operation or execution thereof forever enjoined. By virtue of the provisions of Service Order No. 68, appellant was forced to do one of two things in making four shipments from Highland Park, Iowa to Keller, Virginia. Appellant had: (a) to accept and use whatever size car the

carriers elected to furnish; or (b) to refuse to use a car of a different size from the size of car ordered. The road scrapers had to move to Keller, Virginia, so appellant had no choice but to use the car furnished by the carriers regardless of its size. Appellant asked the Commission to give it relief from the provisions of Service Order No. 68 and, in response to a formal complaint, the Commission has denied appellant relief, which action of the Commission the three-judge District Court, by a 2 to 1 vote, in Civil Action No. 201, (District Court of the United States for the Western District of Virginia (Lynchburg Division)), has sustained the action of the Commission and from that decision appeal has been taken.

## MOTION TO AFFIRM.

The appeal papers were served on November 22, 1949 and appellees' attention was directed to Rule 12 (3) of the Revised Rules of the Supreme Court of the United States, which rule permits appellees to file a motion to affirm within 15 days after the appeal papers are served. The time in which the motion could be filed in the lower court expired on December 7, 1949. The motion was received by the clerk of the lower court on December 8, 1949. Therefore, since the "Motion to Affirm" was not seasonably filed, there is no motion for appellant to answer. However, should we be incorrect in that belief and, being desirous of obtaining relief, we will, without prejudice to or waiving any of our rights, make certain observations in response to the aforesaid document called "Motion to Affirm."

## APPELLEES.

The "Motion to Affirm," even if seasonably filed, has not been filed by a proper party because the motion has been filed by the Interstate Commerce Commission. Title 28, United States Code, Section 2323, provides, in part, as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, *in any action involv-*

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*ing the validity of such order or requirement or any part thereof*, and the interest of such party." (Emphasis added.)

The issue before this Honorable Court is whether or not Section 1 (15) of the Interstate Commerce Act (49 USCA 1 (15)) permits or authorizes the Interstate Commerce Commission to make and issue an order such as Service Order No. 68, dated January 30, 1942, here under consideration. Therefore, the Commission is not a proper party, as an interpretation of a Statute is here involved.

## SERVICE ORDER No. 68.

Of course, if we occupied the position of the Interstate Commerce Commission then we could see Service Order No. 68 as the Commission sees that order, but we are not in that position and we see how that order has affected us without accomplishing any of the purposes for which it was issued.

Section 1 (15) of the Act only provides that the Commission shall have authority to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission only whenever the Commission is of the opinion that a shortage of equipment, congestion of traffic, or other emergency exists in any section of the country.

The authority the Commission claims which permits it to issue an order such as Service Order No. 68 is found only in Section 1 (15) of the Act (49 USCA 1 (15)) and in that section the Commission can only issue such an order as Service Order No. 68 when its application is limited to "any section of the country" and then only when its duration is limited for such time as may be determined by the Commission. Service Order No. 68 has nationwide application, contrary to the specific requirement of Section 1 (15) that the order be limited in its application to "in any section of the country" and that order is to remain in effect until the further order of the Commission, contrary to the specific requirement of Section 1 (15) of the Act that the order remain in effect for such time as may be determined by the Commission. Service Order No. 68 contained no such specific period of time for it to remain in effect, hence the order is void.

The same section, Section 1 (15) of the Act, provides that "in time of war or threatened war, the *President* may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall under the power herein conferred, direct that such preference or priority be afforded." Consequently, Service Order No. 68 is contrary to Section 1 (15) of the Act in two respects: (a) it has nation-wide application when only "sectional application" was authorized by the Act; and (b) it contains no expiration date contrary to the requirement that an expiration date be determined by the Commission—for such time as may be determined by the Commission. Therefore, the motion to affirm, if seasonably filed, should be denied, and this Honorable Court, after full review, should determine the meaning of the provisions of Section 1 (15) of the Act (49 USCA 1 (15)), especially the meaning of *"for such time as may be determined by the Commission."*

## TWO VIEWS OF THE SAME LANGUAGE.

The decision of the District Court in this proceeding is contrary to the decision of a District Court of Missouri in *United States* v. *Thompson*, 58 F. Supp. 213, and, no doubt, had this action been brought in the Missouri District Court, we would have had a different decision from the one we have in this proceeding, as the Court of Missouri, at pages 216 and 217 of 58 F. Supp. said:

> "The law places the burden on the Commission in the first instance of determining the existence of an emergency as a basis for the exercise of the extraordinary powers conferred by the Act, without notice or hearing, and for the issuance of the order. It is apparent from the Act that it was intended that the burden should remain with the Commission to determine the duration of the emergency. By the requirement that the order be for 'periods' as determined by the Commission, the Commission is called upon to reexamine conditions at the end of the period during which, at time of issuing the order, in the judgment of the Commission, the emergency would continue. An order containing no limitation as to time

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> and therefore no 'period' places no such burden on the Commission. It relieves the Commission of the obligation of determining the duration of the emergency and when it has terminated. An order, on its face, to run to the continued existence of an emergency except at the convenience or pleasure of the Commission, and in effect places upon those whose property is affected the burden of proving to the Commission that the emergency no longer exists."

The views of the three-judge Court, in this proceeding, on the proper meaning of *"for such time as may be determined by the Commission"* are contrary to the views of the Missouri District Court in 58 F. Supp. 213. Consequently, justice, we believe, dictates that this Honorable Court should deny the motion to affirm and then fully review this cause.

## REGULATE COMMERCE.

The people of the United States of America delegated to Congress, in Article 1, Section 8 (3), of the Constitution of the United States, the power to regulate commerce with foreign nations and among the several states and with the Indian tribes. Congress, by the Interstate Commerce Act (Part 1) (49 USCA) created the Interstate Commerce Commission for the purpose of administering and enforcing the provisions of the Act with respect *only to transportation by carriers.* We do not think that rules and regulations which unjustly enrich the railroads for service not performed at the expense of appellant is regulating commerce within the meaning of the provisions of the Constitution.

Therefore, inasmuch as Service Order No. 68 does more than regulate commerce in that it provides means by which the carriers can enrich themselves by furnishing larger size cars than the size of cars ordered by the shipper, the Motion to Affirm must be denied.

## CONCLUSION.

We have tried herein to make clear our proposition and to prove that the Motion to Affirm should be overruled. Conse-

quently, inasmuch as one District Court has held contrary views on the same language to the views of the District Court rendering this decision, we believe that substantial injustice will be done unless the conflict is resolved. We, therefore, pray that the motion to affirm be denied.

Respectfully submitted,

AUBREY B. BURTON, doing business as

A. B. BURTON COMPANY.

*By*: W. G. BURNETTE, *Counsel.*

1104-5 Peoples National Bank Building

Lynchburg, Virginia

December 23, 1949.

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